

# **Exhibit F**



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October 27, 2011

U.S. Immigration and Customs Enforcement  
Office of Principal Legal Advisor  
U.S. Department of Homeland Security  
Freedom of Information Office  
500 12th Street, S.W. STOP 5009  
Washington, D.C. 20536-5009

Re: **FOIA Appeal**  
**ICE FOIA Case Number 2011FOIA7112; OPLA11-256**

Dear Sir or Madam:

This letter is an appeal of ICE's adverse determination in relation to the above-referenced FOIA request, which seeks records related to the ability of attorneys to be present during their clients' interactions with ICE in various contexts. ICE's statement that it possesses not one single document responsive to this request indicates beyond any doubt that ICE has failed to conduct an adequate search for responsive records as required by FOIA. The American Immigration Council (AIC) respectfully requests that ICE conduct an adequate search.

AIC submitted a FOIA request to ICE on March 14, 2011 (attached hereto as Exhibit A), which sought any and all records which have been prepared, received, transmitted, collected, or maintained by the U.S. Department of Homeland Security and/or ICE (including any of its subdivisions) that relate in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with ICE;
- What role attorneys may play during their clients' interactions with ICE;
- Attorney conduct during interactions with ICE on behalf of their clients;
- Attorney appearances at ICE offices or other facilities.

AIC's request identified thirteen, non-exhaustive categories of records that would be responsive to this request. *See* Exhibit A at 1-2. Specifically, AIC indicated that responsive records may include but not be limited to:

- 1) Results of evaluations or inspections of detention facilities intended to monitor compliance with ICE Performance Based National Detention Standards, particularly as they impact attorneys' access to detained clients. Of particular

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- importance are evaluations that have monitored compliance with standards related to i) telephone access; ii) attorney visitation; iii) transfer; iv) legal rights group presentations; and v) law libraries and legal materials;
- 2) Guidance or any information obtained by the agency regarding noncitizens' access to counsel during or after worksite or other enforcement actions;
  - 3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to an Order of Supervision appointment or what role the attorney may play during that appointment;
  - 4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning prior to or pursuant to an arrest, including processing and booking, or what role the attorney may play during such questioning;
  - 5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning pursuant to a request for a Stay of Removal or what role the attorney may play during such questioning;
  - 6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS) or what role the attorney may play during such questioning;
  - 7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during general questioning by an ICE officer or what role the attorney may play during such questioning;
  - 8) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to a Notice to Report for Removal or what role the attorney may play during such questioning;
  - 9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning pursuant to a request for Deferred Action or what role the attorney may play during such questioning;
  - 10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to participation in the Intensive Supervision Appearance Program (ISAP) or what role the attorney may play during such questioning;

11) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client to a deferred inspection appointment or what role the attorney may play during questioning at a deferred inspection appointment;<sup>1</sup>

12) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning pursuant to an interview conducted in a jail/ detention facility to determine whether ICE should place a detainer on the individual or what role the attorney should play during questioning at such an interview; or

13) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form EOIR-28 or G-28 on file of ICE's intention to question their clients.

AIC's letter also sought a waiver of all fees associated with the FOIA request because disclosure of the information AIC sought would be "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of" AIC, which is a tax-exempt charitable and educational institution.

AIC received two letters dated March 31, 2011 from ICE FOIA Officer Catrina M. Pavlik-Keenan acknowledging receipt of its request (attached hereto as Exhibits B and C). One of the letters stated that ICE would "charge [AIC] for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters." The other stated: "As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records." Neither letter provided any substantive response to AIC's request for records.

ICE provided no further response to AIC's request within the twenty days allowed under 5 U.S.C. § 552(a)(6). AIC construed the lack of response as a constructive denial of its request and filed an administrative appeal on August 11, 2011. In response to the appeal, the Office of the Principal Legal Advisor (OPLA) informed AIC by letter dated September 23, 2011 (attached hereto as Exhibit D) that certain ICE divisions now had been assigned to conduct searches for responsive records. Specifically, the ICE FOIA office had tasked OPLA, the Office of Enforcement and Removal Operations (ERO), and Homeland Security Investigations (HSI) to conduct searches responsive to the request. Because the case was "being processed in the order it was received" and any responsive documents would be "processed according to the FOIA upon receipt from the program office," ICE closed the appeal as moot.

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<sup>1</sup> AIC withdraws this request for records related to deferred inspection interviews to the extent these interviews are conducted by Customs and Border Patrol (CBP) officers and do not involve ICE officers.

Only four days after notifying AIC that the appeal was closed, the FOIA office issued a letter (dated September 27, 2011) stating that ICE was not able to locate any records responsive to AIC's original FOIA request (attached hereto as Exhibit E). That letter, signed by FOIA Officer Catrina M. Pavlik-Keenan, states that "ICE has conducted a comprehensive search of files within the ICE Office of Enforcement and Removal Operations (ERO), the Office of Homeland Security Investigations (HSI) and the ICE Office of the Principal Legal Advisor (OPLA)" for records responsive to AIC's FOIA request, but that these divisions "were unable to locate or identify any responsive records."

ICE has failed to perform an adequate search for responsive records, as required by FOIA. In addition, ICE's correspondence indicates that it has at least implicitly denied AIC's request for a fee waiver. This letter constitutes an appeal of both adverse determinations. This appeal is filed within 60 days of ICE's September 27, 2011 letter, as required by 6 C.F.R. § 5.9.

#### 1. ICE DID NOT CONDUCT AN ADEQUATE SEARCH.

ICE did not conduct an adequate search for records responsive to AIC's comprehensive request for documents related to noncitizens' access to counsel in their interactions with ICE, as required by 5 U.S.C. § 552(a)(3).

An agency must carry out a reasonable search for records responsive to the FOIA request. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). In responding to a FOIA request, an "agency must search for documents in good faith, using methods that are reasonably expected to produce the requested information." *Concepcion v. U.S. Customs and Border Protection*, 767 F. Supp. 2d 141, 145 (D.D.C. 2011); *see also Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). For several reasons, it is clear that ICE has not met its obligation to conduct a reasonable search.

First, ICE's search was facially incomplete. "To demonstrate the adequacy of its search, [an agency] must show that it searched *all* files likely to contain records responsive" to a FOIA request. *Concepcion*, 767 F. Supp. 2d at 146 (emphasis added). ICE's letter clearly shows that it did not do so. AIC's request sought records maintained by ICE Headquarters offices—specifically by the Office of Detention Policy and Planning (ODPP)—as well as those maintained by field offices and other ICE organizational units. Yet ICE's response letter indicates that ICE only searched "files within the ICE Office of Enforcement and Removal Operations (ERO), the ICE Office of Homeland Security Investigations (HSI) and the ICE Office of the Principal Legal Advisor (OPLA)." ICE's search thus excluded ODPP, which was specifically named in AIC's request, as well as ICE field offices.

Second, ICE's letter states that "FOIA does not require federal agencies to conduct research projects . . . but rather is limited to requiring agencies to provide access

to reasonably described, nonexempt records,” and it thereby implies that AIC’s request did not reasonably describe the records it sought.<sup>2</sup>

FOIA simply requires AIC or any other requester to “reasonably describe[]” the records sought in order to trigger an agency’s obligation of disclosure. 5 U.S.C. § 552(a)(3)(A)(i). AIC’s request described in detail the categories of information and types of records sought, as well as the ICE divisions where responsive records might be located. Indeed, the request described thirteen specific categories of responsive records, detailing precise types of encounters between noncitizens and ICE personnel that are likely to implicate access-to-counsel issues. *See* Ex. A at 1-2. These specific details enabled ICE to carry out a reasonable search for responsive documents, but it failed to do so.

Finally, given the range of specific types of records requested and the nature of ICE’s functions and duties, it is virtually impossible that an adequate search would fail to disclose documents responsive to AIC’s request. According to its website, ICE is the “second largest investigative agency in the federal government” and its primary mission includes enforcement of federal immigration laws as well as apprehension, detention, and removal of aliens. *See* <http://www.ice.gov/about/overview>. Every day, noncitizens all over the country interact with ICE and its agents under circumstances calling for the assistance of legal counsel. In fact, DHS regulations provide that noncitizens have a right to be represented before the agency. *See* 8 C.F.R. § 292.5. Given this, it is simply impossible that ICE undertook a reasonable search and determined that no documents were responsive to AIC’s requests.

Indeed, even a cursory search of ICE’s own website reveals responsive documents ICE has disclosed in response to past FOIA requests; similarly, responsive documents very likely exist but have not been disclosed. Simply entering the phrase “access to counsel” into the search utility at [www.ice.gov](http://www.ice.gov) reveals, for example, a number of reports and audits related to access-to-counsel issues at ICE detention facilities. Such documents are of course only one type among the numerous specific categories of records AIC requested, which include reports, policies, e-mails, manuals, memoranda, training materials, and studies.

This makes clear that ICE could not have undertaken a reasonable search.

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<sup>2</sup> We note that ICE did not decline to undertake a search on the ground that the records were not reasonably described. To the contrary, it claimed to have conducted “a comprehensive search,” thereby demonstrating that it understood what records were sought. AIC nevertheless addresses the issue of reasonable description here because ICE’s response letter may be understood to raise it.

**2. AIC IS ENTITLED TO A FEE WAIVER.**

Under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k), a fee waiver is to be granted when “(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) Disclosure of the information is not primarily in the commercial interest of the requester.” 6 C.F.R. § 5.11(k). AIC’s request meets both requirements, and in the event responsive records are located, AIC will be entitled to a fee waiver.

*a. Disclosure of the Information Is In the Public Interest.*

DHS considers four factors, set forth in 6 C.F.R. § 5.11(k), when determining whether disclosure of requested information is in the public interest:

- (1) “Whether the subject of the requested records concerns ‘the operations or activities of the government,’”
- (2) “Whether the disclosure ‘is likely to contribute’ to an understanding of government operations or activities,”
- (3) “Whether disclosure of the requested information will contribute to ‘public understanding’” as opposed to the individual understanding of the requester; and
- (4) “Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

As set forth below, AIC meets all four requirements.

*1. The subject of the requested records concerns the operations and activities of the government.*

The records AIC seeks plainly concern the operations and activities of the government. ICE is a component of the U.S. Department of Homeland Security, a cabinet-level department of the federal government. It is responsible for enforcement of federal immigration law, including investigation, apprehension, and removal of removable noncitizens. The records AIC seeks relate to ICE’s policies in connection with noncitizens’ access to counsel in interactions with the agency. Such interactions are very clearly “operations and activities” of the government.

*2. Disclosure is likely to contribute to an understanding of government operations or activities.*

Disclosure of the records sought by AIC’s request will contribute to a deeper understanding of the role of counsel before ICE.

AIC’s Immigration Policy Center (IPC) and Legal Action Center (LAC) reach out to lawyers and the general public to promote a better understanding of immigration law, policy, and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs, and crime), and regularly provides



information to leaders on Capitol Hill and the media. See [www.immigrationpolicy.org](http://www.immigrationpolicy.org). The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. See [www.legalactioncenter.org](http://www.legalactioncenter.org). Relevant to this FOIA request, the LAC has historically focused on access-to-counsel issues. Specifically, the LAC provides education about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the harms of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security.

Beyond the limited documents available on ICE's website and the INS Examinations Handbook, AIC is not aware of any publicly available documents explaining how and why ICE limits access to counsel in various settings. Release of such documents will significantly increase understanding of ICE's policies involving counsel.

3. *Disclosure will contribute to public understanding of government operations or activities.*

Disclosure of the requested information will also contribute to "public understanding," as opposed to the understanding of a narrow segment of interested persons. Release of the information to AIC will significantly advance the general public's understanding of CBP's policies toward counsel. AIC has the capacity, legal expertise, and intention to review, analyze, and synthesize this information and make it accessible to a broader public audience. In addition to providing all released information on its website, AIC plans to draft one or more summary reports on the records received in response to its FOIA request.

AIC has the intention and capacity to disseminate such reports by posting them on the AIC website, which contains immigration-related information and news, and is accessible by any member of the public. AIC's website receives more than 58,000 monthly visitors and information available on the website is regularly shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will publish the summary reports in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC has regular contact with national print and news media and plans to continue to share information gleaned from FOIA disclosures with interested media.

4. *Disclosure of the requested information will contribute significantly to public understanding of noncitizens' access to counsel in interactions with ICE.*

Disclosure of the requested information will contribute significantly to public understanding of ICE practices related to noncitizens access to legal counsel. This issue is of sufficient importance that a federal regulation, 8 C.F.R. § 292.5(b), has been adopted to address the role of counsel before ICE and other agencies.



Interviews and interactions with ICE officers can be intimidating and confusing, and noncitizens often seek assistance from attorneys to help navigate these encounters. Detention in ICE facilities deprives noncitizens of their liberty and threatens other legal interests, and detainees' access to counsel is according crucial. It is vitally important that noncitizens and attorneys alike understand when and for what reasons access to counsel may be limited before ICE. In addition, U.S. citizens may be subject to the same treatment as noncitizens if an ICE officer questions their citizenship. Citizens accordingly have an equally important stake in understanding ICE policies related to counsel.

The records sought by AIC's FOIA request will inform noncitizens at risk of removal from the United States, noncitizens in ICE custody, the attorneys who represent them, and other members of the public who are concerned with the fairness of immigration agency proceedings and policies. Because there is no publicly available comprehensive ICE guidance governing attorney representation and conduct, the dissemination of these records will significantly improve public understanding of the scope of representation permitted before ICE. The disclosure and dissemination of the requested records also may help explain disparate treatment by ICE of attorneys and their noncitizen clients throughout the country. Finally, this information will inform nonprofit and international organizations interested in the treatment of noncitizens in proceedings before ICE.

***b. Disclosure of the Requested Information is Not Primarily in the Commercial Interest of the Requester.***

DHS considers two factors, set forth in 6 C.F.R. § 5.11(k)(2), when determining whether disclosure of requested information is primarily in the commercial interest of the requester:

- (1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure"; and
- (2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the public and not for any commercial gain. The LAC has a long record of administrative advocacy concerning issues related to counsel in immigration proceedings. Like all other reports and information available on the AIC website, information about counsel received in response to AIC's FOIA request will be widely distributed to immigration attorneys, noncitizens, and other interested members of the public free of charge. Given that FOIA's fee waiver requirements are to be "liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified in this case. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

Please provide a response to this appeal within the twenty days allowed by 5 U.S.C. § 552(a)(6)(A)(2). Thank you for your attention to this matter, and please do not hesitate to contact me if you have questions or would like clarification of any of the requests above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Emily J. Creighton", with a long horizontal flourish extending to the right.

Emily Creighton

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